IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 93-00549**
CHARLES A. CRONER and KAREN F. CRONER,	)	
	)	
Debtors.	)	
	)	
KRISTINA KAY CARRIER and ROBERT ALLEN CARRIER, deceased,	)	**Adv. No. 97-6330**
	)	
Plaintiffs,	)	**MEMORANDUM OF DECISION**
	)	
vs.	)	
	)	
CHARLES A. CRONER and KAREN CRONER, husband and wife,	)	
	)	
Defendants.	)	

Kristina Kay Carrier, Eagle, Idaho, Pro Se Plaintiff.

Jon Wilson, Boise, Idaho, for Defendants.

John Krommenhoek, Boise, Idaho, Trustee.

This decision requires the Court to examine what appears to be one of the most unfortunate collections of events and circumstances that the Court has yet encountered. Assuming the facts are as alleged by the creditor, she has been lied to or had her rights neglected or abused by debtors, lawyers, a bankruptcy Trustee, and several others. If equity was the standard for decision in this action, clearly the creditor should prevail. However, in what will inevitably be viewed by some as yet another injustice, the applicable law dictates that the creditor receive no relief.

Background.

Plaintiff Kristina Carrier filed this adversary proceeding on behalf of her deceased husband and herself on October 15, 1997, objecting to entry of a discharge in favor of Defendants Charles and Karen Croner in connection with the completion of payments under Defendants' confirmed Chapter 13 Plan. Before the Court for disposition is Defendants' Motion to Dismiss filed on August 10, 1998. Following a hearing on the motion on November 12, 1998, the matter was taken under advisement. The Court was invited by the parties to consider, and has examined, matters outside the pleadings, including affidavits

filed by Plaintiff,[1] Defendants and the Chapter 13 Trustee. The parties were also given an opportunity to submit briefing on the issues. Thus, because more than the pleadings have been reviewed, the Court will treat Defendants' Motion to Dismiss as a Motion for Summary Judgment. *Cunningham v. Rothery (In re Rothery)*, 143 F.3d 546, 548-49 (9th Cir. 1998); F.R.B.P. 7012 and F.R.C.P. 12(b).

Facts.

Certain undisputed, relevant facts appear from the record.

In March 1992, Plaintiff met with Defendant Charles Croner to discuss a remodel job on Plaintiff's home. Having reached an agreement to proceed, Mr. Croner, along with several other workers, including his wife and her son, undertook the project shortly thereafter. Work continued on Plaintiff's home until July 29, 1992, when Ada County issued an order compelling Mr. Croner to stop work on the project due to alleged unsafe conditions.

To say the least, the quality of Defendants' work on Plaintiff's home fell well below her expectations. Mr. Croner and his pastor had allegedly represented to Plaintiff that Croner had significant building and remodeling

[1] In addition to her own sworn statements, Plaintiff's submissions included several hundred pages of documentary evidence and a video-taped presentation.

experience. Both men allegedly told Plaintiff that Croner had built a 450 home subdivision and had performed many remodel jobs including several churches in the Boise area. Croner also represented himself to be a "licensed builder" and claimed to be "bonded." As it turns out, Croner was in fact a painter with little, if any, experience, and arguably not much skill, in either building or remodeling.

Croner severely damaged Plaintiff's home. During the course of Croner's work on Plaintiff's house, Croner cut through every major support beam in the home, creating severe structural damage. He used a chain saw to cut through electrical wiring. The work Croner completed was not in accordance with building codes and did not pass county inspection. In fact, he had rendered Plaintiff's home unsafe. Croner also failed to secure a portion of the kitchen flooring, and Plaintiff fell through the floor, injuring her leg.

After Plaintiff realized that Croner was not an experienced builder and that Croner had caused major damage to the house, Plaintiff contacted an attorney, Mark Ingram, to help her secure relief. In August 1992, Mr. Ingram sent a demand letter to Croner demanding $100,000 in damages, consisting of the $35,000 that Plaintiff had already paid Croner, along with the $65,000 in estimated expenses to cure Croner's substandard work. Later that same month, Plaintiff also discussed her case with attorneys at Givens, Pursley, Webb &

Huntley in Boise. Attorneys Robert Huntley and Steven Olsen undertook the representation of Plaintiff and on January 22, 1993, filed a complaint on her behalf against Croner in state court. The complaint alleged false representation and breach of contract and sought $33,000 for reimbursement and $35,000 for costs associated with fixing Croner's work. Croner did not answer the complaint, and on February 23, 1993, Plaintiff's lawyers filed a Notice of Intent to Take Default. However, before Plaintiff could obtain a default judgment, Defendants filed for protection under Chapter 13 of the Bankruptcy Code on March 2, 1993 (Case No. 93-00549).

Plaintiff was listed as an unsecured creditor in Defendants' bankruptcy case as was her attorney, Mr. Olsen. The Court's clerk sent her, and she acknowledges that she received, a written notice of the filing of the bankruptcy case containing the relevant dates for the Section 341 meeting of creditors (April 16, 1993), and the confirmation hearing (May 18, 1993). The Notice of Commencement of Case also informed Plaintiff, in bold capitalized print, that objections to the confirmation of Debtors' plan needed to be filed prior to the Section 341 meeting of creditors or within five days thereafter and that in the absence of an objection, a plan could be confirmed without a hearing.

In early April 1993, Plaintiff was working in the office of David Haley, an attorney in Burley, Idaho. On April 16, 1993, the Chapter 13 Trustee received a letter from Mr. Olsen explaining that Plaintiff would be represented by Mr. Haley in the bankruptcy proceeding. Plaintiff alleges that she was counseled by Mr. Huntley that she need not appear at the Section 341 meeting of creditors, the lawyer allegedly telling her that her lawyer's attendance would be "a waste of her time and money." Neither Plaintiff nor her attorney appeared at the April 16, 1993, creditor's meeting.

Defendants' Chapter 13 Plan had been filed on April 1, 1993. A certificate of Defendants' attorney indicating that on March 5, 1993, the Plan had been served on creditors, including Plaintiff, was filed with the Court on April 6, 1993. Since Defendants' Plan is dated March 30, the Court presumes that the Certificate of Service should read April 5 instead of March 5. Defendants' Plan made no specific proposal for payment of Plaintiff's unsecured claim, and provided for pro-rata payments to all unsecured creditors. The Plan also contained a provision providing that:

> In the absence of the [sic] written objection filed with the Court and served upon the debtor's counsel and upon the Chapter 13 Trustee, not less than seven (7) days prior to the date fixed for the hearing of confirmation, the Court may confirm this Chapter 13

> Plan and accept the valuations and allegations asserted therein.

The only objection to confirmation of Defendants' original Plan was filed by the Internal Revenue Service.

Defendants filed an Amended Plan on May 3, 1993. The only change made in the Amended Plan was to increase payments to be made by Defendants into the Plan to satisfy the IRS claim. No change was made for the treatment of unsecured creditors. The IRS objection was thereby resolved.

The Amended Plan contained the same provision that allowed for confirmation without a hearing in the absence of a filed objection. Because the only objection to confirmation of Defendants' plan had been resolved by the amendment and stipulation, the Plan was confirmed without a hearing on May 6, 1993, some twelve days prior to the scheduled confirmation hearing.

Plaintiff asserts that her attorney, Mr. Haley, called the Chapter 13 Trustee on May 5, the day before the Plan was confirmed, to discuss Plaintiff's possible objection to confirmation.[2] Trustee allegedly informed Mr. Haley that the documents had already been submitted to the Court for confirmation and that

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[2] Plaintiff does not articulate her basis for objecting to confirmation of Defendants' plan, other than possibly that Defendants failed to provide the Court correct information about their financial affairs and failed to properly disclose all of their assets, and that the proposed treatment of her claims in Defendants' plans was unfair. However, in deciding this case, the Court assumes Plaintiff's allegations might support an objection that Defendants' plan were not proposed in good faith. 11 U.S.C. § 1325(a)(3).

it was too late to voice concerns over the Plan. Mr. Haley was also told that someone should have attended the creditor's meeting to raise any concerns that may have existed. An order confirming the Amended Plan was entered on May 6.

On July 8, 1993, Plaintiff filed her proof of claim with this Court for $100,000. On September 3, 1993, she amended the proof of claim to $57,095.65.

In short, for the several reasons she explains in her submissions, Plaintiff failed to take any formal action to object in writing with the Court to confirmation of Defendants' Chapter 13 plans on any grounds. It also appears that Defendants' Amended Chapter 13 Plan was confirmed by the Court, upon the Trustee's recommendation, prior to the deadline given by the Plan for the filing of an objection to confirmation. This procedural irregularity could have been a basis for Plaintiff to request revocation of the order confirming the Amended Plan. Instead, Plaintiff took no action to request a revocation of the order of confirmation. She ultimately received $1,134.96 as a creditor in distributions through the Plan.

On September 9, 1997, the Chapter 13 Trustee filed his Final Report and Account with the Court. On September 13, 1998, the Bankruptcy

Noticing Center served notice on all parties in the bankruptcy case of the deadline for filing objections to Defendants' receipt of a discharge. On October 16, 1997, the last day she could timely do so, Plaintiff, acting *pro se*, filed this adversary proceeding objecting to Defendants' discharge. In the complaint, she describes the Defendants' alleged prebankruptcy misconduct, her resulting damages, and pleads for equitable consideration in light of what seems to be her genuinely unfortunate circumstances.[3] She asks that Defendants be denied a discharge.

Standard of Law.

A motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, made applicable here by F.R.B.P. 7056. Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the non-moving party, there is no genuine issues of material fact remaining and the moving party is entitled to judgment as a matter of law.

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[3] Defendants were retained to remodel Plaintiff's home to accommodate the special needs of her husband, Robert, who is a named Plaintiff in this action. He had fallen tragically ill and later died. According to Mrs. Carrier, she was required to liquidate most of the family's holdings to pay for the damages to her home and bills associated with Robert's illness. She alleges she has no assets, and is receiving disability benefits, although she is attending college, with the help of student loans, to acquire job skills. She alleges that "the taxpayers shouldn't bear the burden for my education and welfare, while [Defendant] Mr. Croner is dismissed of all responsibility for his actions . . . ." Complaint at ¶ IX.

F.R.B.P. 7056; *State Farm Mutual Auto Ins. Co. v. Davis*, 7 F.3d 180, 182 (9th Cir. 1993); *FSLIC v. Molinaro*, 889 F.2d 899, 901 (9th Cir. 1989). In this case, while some factual issues exist, sufficient undisputed, material facts are present in this record and from the record in Defendants' bankruptcy file to dispose of the issues.

Discussion and Disposition of Issues.

Defendants, as Chapter 13 debtors, proposed, had confirmed by the Court, and now have admittedly performed according to the terms of a Chapter 13 plan. As soon as practicable after completion of payments by the debtors of all payments required under a confirmed plan, the court is commanded by the Code to grant debtors a discharge. 11 U.S.C. § 1328(a). That discharge will apply to all debts provided for by the plan including, absent the pending objection, Plaintiff's claims against Defendants. *Id.* A discharge under Section 1328(a) is sometimes referred to as a "super-discharge" because it applies to many kinds of debts described in Section 523(a) that would not be discharged in a Chapter 7 liquidation bankruptcy case, including debts incurred by fraud, or debts arising from most intentional torts. 11 U.S.C. § 523(a)(2), (6); § 727(a), (b). As a result, Plaintiff's claims against Defendants, even those

based upon Defendants' alleged fraud or reckless injuries to Plaintiff's property, can be discharged through Defendants' completion of their confirmed plan. To be afforded any relief, then, Plaintiff must attack confirmation of Defendants' plan in the first instance. This is no easy task under the Code.

The confirmation of a Chapter 13 plan is res judicata as to all justiciable issues which were, or could have been, decided prior to or at the confirmation hearing. *Multnomah County v. Ivory (In re Ivory)*, 70 F.3d 73, 75 (9th Cir. 1995). "Applying res judicata to confirmation orders enforces the doctrine of finality as expressed in [Section] 1327(a)." *Bright v. Ritacco (In re Ritacco)*, 210 B.R. 595, 597 (Bankr. D. Oregon 1997). In order to avoid the res judicata effect of Defendants' Amended Chapter 13 Plan, and to prevent Defendants from receiving a discharge, Plaintiff must qualify under one of a limited number of theories through which relief from the confirmation order may be available.

First, Section 1330(a) of the Bankruptcy Code provides that:

> On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

11 U.S.C. § 1330(a). Recently, the Third Circuit Court of Appeals compared two possible interpretations of Section 1330(a), explaining that:

> First, the section can be read to say that a confirmation order can be revoked only upon a showing of fraud, and to set a 180-day time frame within which a motion for such relief may be tendered. Second, the section can be read as only prescribing a 180-day time limit on motions to revoke orders that were procured by fraud, without speaking at all to the subject of other potential grounds for revocation.

Branchburg Plaza Associates v. Fesq (In re Fesq), 153 F.3d 113, 115 (3rd Cir. 1998). The Court embraced the first interpretation, holding that the confirmation order can only be revoked upon a showing of fraud and only within the prescribed 180 day time period since such an approach was the most reasonable interpretation of Congress' intent. *See also Laurel Federal Credit Union v. Hoppel (In re Hoppel)*, 203 B.R. 730, 732 (Bankr. D. Montana 1997)(confirmation order must be procured by fraud in order to apply Section 1330(a)). The Court finds this approach persuasive. The Court explained that prior to the changes made as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Sections 1144, 1230, and 1330 all contained the same standard for the revocation of confirmation orders within each respective chapter. The 1984 amendments changed the language in Section 1144 to read "if and only if such order was procured by fraud." 11 U.S.C. § 1144. The Court

reasoned that there was no rational explanation for having a different standard under Chapter 11 than under Chapters 12 or 13. *Fesq*, 153 F.3d at 118; *8 Collier on Bankruptcy*, ¶ 1144.02 n.1 (Matthew Bender 15th Ed. Revised 1996)(there are minor textual differences between 1144 and 1330, however, the differences are "not substantive and the standards for revocation should be the same under all three chapters"). Further, the Court's reading of Section 1330(a) best protects the finality of a confirmed Chapter 13 order.

Here, Plaintiff admittedly failed to request a revocation of the confirmation order within 180 days of confirmation. The Plan was confirmed on May 6, 1993. Even assuming the facts she alleges in her present complaint and submissions can be construed as "fraud" in connection with procuring confirmation of the Amended Plan, the 180 day deadline to seek revocation of the confirmation order would have expired on approximately November 6, 1993. Plaintiff filed this adversary proceeding on October 15, 1997, nearly four years after that deadline.

More fairly, Plaintiff does not specifically allege there was fraud in connection with the confirmation of Defendants' Plan. Instead, she suggests that those involved in the process were negligent in representing or respecting her rights as a creditor, and that any blame for her failure to object to

confirmation lies not only with Defendants and their attorney, but also with her own lawyers, the Chapter 13 Trustee, and the Court. No doubt, each played a role along the path toward confirmation of the plan in this case. While Plaintiff may have received less than prudent legal advice in failing to act promptly to object to the Plan, and may have been deprived of an opportunity to object to the confirmation of the Amended Plan due to the premature confirmation of the Plan without a hearing, these problems do not rise to the level of fraud. Each breakdown in the chain was, at most, a result of inadvertence, neglect, or mistake. Plaintiff has shown no evidence of intent by any of the parties to fraudulently obtain confirmation of the Amended Plan.

Further, even if Plaintiff could advance facts sufficient to establish fraud, the Court is well beyond the 180 day time period during which Congress allows the Court to reexamine whether a plan should have been confirmed. Therefore, the confirmation order cannot be revoked under Section 1330(a).

Second, Plaintiff might rely upon Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy proceedings by F.R.B.P. 9024, which provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence,

> surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

F.R.C.P. 60(b). However, in a special exception to operation of Rule 60(b) in bankruptcy cases, Rule 9024 requires that a complaint to revoke a confirmation order under Section 1330 be filed within the time allowed by that statute. F.R.B.P. 9024. Although Plaintiff may have argued she was entitled to relief under the various provisions of Rule 60(b), no such argument was advanced until this adversary proceeding was filed on October 15, 1997. She was late.

Moreover, even if the special time limit contained in Rule 9024 did not constrain the Court, and Plaintiff's request for relief from the effect of Defendants' confirmed plan could be examined under general Rule 60(b) tenets, the request must still be made within either one year or a reasonable time, depending upon the grounds. Here, relief was not sought until four years after the order of confirmation. On this record, this is not reasonable, and relief is not appropriate under Rule 60(b).

Even apart from considerations based upon the language of the above Rules and Code provisions, the Court is reluctant to disturb a final confirmation order, especially years after the order was entered, and after all payments have been completed under the plan. The Court has on prior occasions addressed the policy considerations concerning the effect of confirmation orders pursuant to Section 1327(a):

> The purpose of section 1327(a) is the same as the purpose served by the general doctrine of res judicata. There must be finality to a confirmation order so that parties may rely upon it without concern that actions which they may thereafter take could be upset because of a later change or revocation of the order.

In re Walker, 128 B.R. 465, 467 (Bankr. D. Idaho 1991)(quoting 5 *Collier on Bankruptcy* , ¶ 1327.01[1] (15th Ed. 1990)); *In re Varela*, 85 I.B.C.R. 10. In this case, Defendants completed performance of their Chapter 13 Plan before receiving notice of Plaintiff's desire to revisit confirmation issues and to object to discharge. To upset the confirmation order at this point in time would not only be contrary to the Bankruptcy Code and Rules, it would be extremely unfair to Defendants. After all the years and payments they have made, Defendants should be able to rely upon the finality of their Plan, and their right to a discharge upon completion of the terms of the Plan. To upset confirmation of

the Plan at this late date would seriously undermine the policy favoring finality under Section 1327.

The Bankruptcy Code, Rules and rules of this Court, require a debtor to provide creditors with notice of a proposed plan and any relevant hearings. 11 U.S.C. § 1324; F.R.B.P. 2002(b); F.R.B.P. 3015; L.B.R. 2002.5. Once a debtor has satisfied this duty, the creditor bears the burden of taking affirmative steps to evaluate, advance, and protect its rights. *In re Walker*, 128 B.R. 465, 468 (Bankr. D. Idaho 1991); *In re Davies*, 90 I.B.C.R. 50, 52. Here, Plaintiff: (1) received notice of the Chapter 13 proceedings; (2) received a copy of Defendants' Chapter 13 Plan and First Amended Plan; (3) had notice of the 341 meeting and confirmation hearing; and (4) had notice that in the absence of a written objection Defendants' Plan could be confirmed without a hearing. Plaintiff wasn't merely late in objecting to confirmation, she did not act at all. Then, even after learning the Plan had been confirmed, Plaintiff failed to timely seek a revocation of the confirmation order. In the meantime, Plaintiff received payments along with all other creditors under the confirmed plan.

When a creditor receives notice of a Chapter 13 filing concerning its debtor, the creditor has also received at least constructive or inquiry notice that its claim may be affected by the proceedings, namely the confirmation of a

plan. *In re Walker* at 467. If the creditor chooses to ignore such notice, it does so at its own peril. *Id.* Here, Plaintiff received notice of the Chapter 13 proceedings and had notice that the confirmation of Defendants' Plan could affect her claim. Plaintiff was represented by counsel, in fact, by multiple attorneys. While a procedural error occurred when the Court entered an order confirming the Plan prior to the deadline stated in the notice to creditors and Amended Plan, Plaintiff was not without a remedy.

Conclusion.

After reviewing the submissions of the parties and applying the law, summary judgment is appropriate in this case. Assuming all facts asserted by Plaintiff are true, Defendants are entitled to judgment as a matter of law. Plaintiff is precluded from the relief sought in her complaint, denial of Defendants' discharge, by the 180 day time periods provided in Section 1330(a) of the Bankruptcy Code and Rule 9024 of the Federal Rules of Bankruptcy Procedure. Even if Plaintiff could show facts which might have persuaded the Court to deny confirmation of Defendants' plan at the time, there is no legal theory under which Plaintiff can now be afforded relief.

While the Court is not pleased to add to Plaintiff's misfortunes, Defendants' Motion must be granted, and this action should be dismissed. Counsel for Defendants shall submit an appropriate order for entry by the Court.

DATED This _____ day of February, 1999.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk